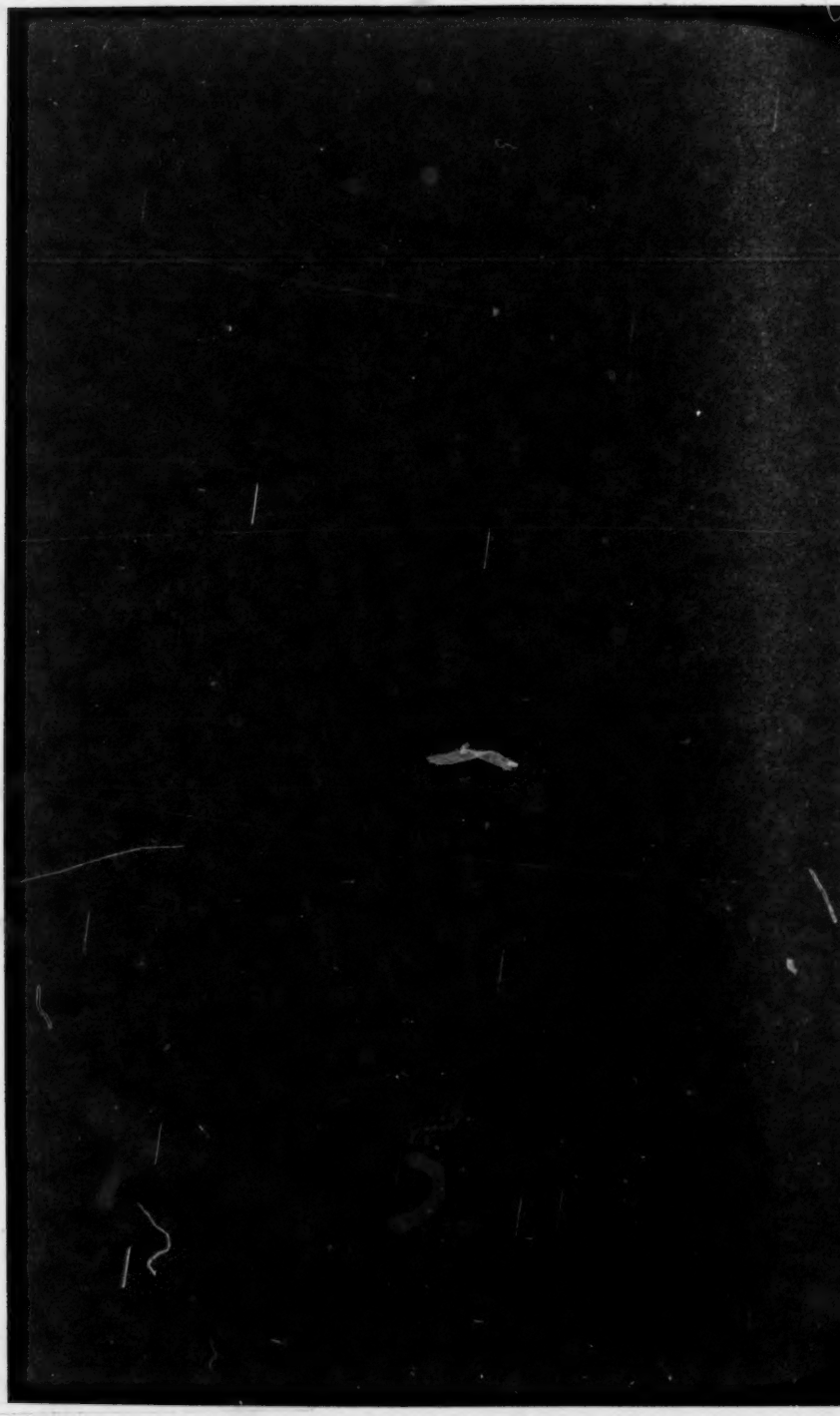

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Nos. 280, 281

SUPREME COURT OF THE UNITED STATES

October Term, 1953

PHILLIPS PETROLEUM COMPANY, Petitioner,

v.

STATE OF WISCONSIN AND PUBLIC SERVICE COMMISSION OF WISCONSIN; CITY OF DETROIT, MICHIGAN; CITY OF KANSAS CITY, MISSOURI; CITY OF MILWAUKEE, a municipal corporation; COUNTY OF WAYNE, MICHIGAN; and THE FEDERAL POWER COMMISSION, Respondents.

STATE OF TEXAS AND THE RAILROAD COMMISSION OF TEXAS; CORPORATION COMMISSION OF OKLAHOMA; and STATE OF NEW MEXICO and OIL CONSERVATION COMMISSION OF NEW MEXICO,
Petitioners,

v.

STATE OF WISCONSIN and PUBLIC SERVICE COMMISSION OF WISCONSIN; CITY OF DETROIT, MICHIGAN; CITY OF KANSAS CITY, MISSOURI; CITY OF MILWAUKEE, WISCONSIN; COUNTY OF WAYNE, MICHIGAN; and THE FEDERAL POWER COMMISSION.
Respondents.

On Writs of Certiorari to The Court of Appeals for the District of Columbia Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now come B. J. Essex and O. C. Harper, and respectfully move this Court, pursuant to Rule 27, Paragraph 9 of the rules of this Court, for leave to file the accompanying brief in these cases as amici curiae. The interest of the above named producers and their reasons for asking for leave to file a brief amici curiae are set forth below.

B. J. Essex and O. C. Harper own and operate five wells in the State of Texas from which oil and gas are produced and sold. Such sales are all arms-length transactions. They have no interest in, nor are they in any way affiliated or connected with any gas transmission company.

These producers have never considered their operations subject to regulation by the Federal Power Commission and have been advised by their attorney, who is filing this brief and who has represented them for more than fifteen years, that they are expressly excluded from the provisions of the Natural Gas Act.[1] The producers are alarmed at the statement in the decision of the Court below that:

> "The Supreme Court has repeatedly upheld the Commission's authority under the Natural Gas Act to regulate the rates at which a producer and gatherer of natural gas sells it, after producing

[1] *52 Stat. 833, 15 USCA 717 to 717(w), Inc.*

and gathering it, to pipeline companies for resale in other states."[2]

This broad statement creates confusion and doubt as to the status of these producers and the many thousands of other independent producers of oil and gas under the Natural Gas Act. If not corrected by this Court, the statement quoted above will seriously affect and disrupt further efforts of independent producers to explore for and develop additional reserves of oil and gas so vitally essential to the welfare of the country.

These producers are vitally interested in these cases and respectfully request the Court to consider the attached brief for a clarification and correction of the decision below, especially insofar as it purports to extend the "Commission's authority under the Natural Gas Act to regulate the rates at which a producer and gatherer of natural gas sells it, after producing and gathering it, to pipeline companies for resale in other states."

---

[2]State of *Wisconsin* v. *Federal Power Commission*, 205 F. 2d at Page 709.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1953

No. 280

PHILLIPS PETROLEUM COMPANY, Petitioner,

v.

STATE OF WISCONSIN AND PUBLIC SERVICE COMMISSION OF WISCONSIN; CITY OF DETROIT, MICHIGAN; CITY OF KANSAS CITY, MISSOURI; CITY OF MILWAUKEE, a municipal corporation; COUNTY OF WAYNE, MICHIGAN; and THE FEDERAL POWER COMMISSION, Respondents.

No. 281

STATE OF TEXAS AND THE RAILROAD COMMISSION OF TEXAS; CORPORATION COMMISSION OF OKLAHOMA; and STATE OF NEW MEXICO and OIL CONSERVATION COMMISSION OF NEW MEXICO, Petitioners,

v.

STATE OF WISCONSIN and PUBLIC SERVICE COMMISSION OF WISCONSIN; CITY OF DETROIT, MICHIGAN; CITY OF KANSAS CITY, MISSOURI; CITY OF MILWAUKEE, WISCONSIN; COUNTY OF WAYNE, MICHIGAN; and THE FEDERAL POWER COMMISSION, Respondents.

On Writs of Certiorari to The Court of Appeals for the District of Columbia Circuit

BRIEF AMICI CURIAE OF B. J. ESSEX AND O. C. HARPER

B. J. Essex and O. C. Harper, amici curiae, own and operate five wells in the State of Texas from which oil and gas are produced. The oil produced from these wells is sold in the field to one company. The gas is produced and sold in an arms-length transaction to another company. These producers do not operate, have no interest in, and are in no way affiliated or connected with, the company to which the gas is sold.

These producers, like thousands of other such producers, have never considered their operations subject to regulation by the Federal Power Commission.

A "producer and gatherer" of natural gas is a broad term. It would include thousands of independent producers and gatherers of natural gas. An independent producer and gatherer of natural gas is one who is not himself an interstate transporter of natural gas; is not a subsidiary of or owned or controlled by an interstate transporter of natural gas; does not own or control an interstate transporter of natural gas; and is not affiliated or associated in any way with an interstate transporter of natural gas.

To alleviate the industry-wide repercussions which the erroneous statement in the decision of the court below will precipitate, this Court should expressly reject that decision, especially insofar as it purports to extend the Commission's "authority under the Natural Gas Act to regulate the rates at which a producer and gatherer of natural gas sells it, after producing and

gathering it, to pipeline companies for resale in other states."

I.

CONGRESS DID NOT INTEND, AND THIS COURT HAS NOT HELD, THE ACT TO AUTHORIZE THE FEDERAL POWER COMMISSION "TO REGULATE THE RATE AT WHICH A PRODUCER AND GATHERER OF NATURAL GAS SELLS IT, AFTER PRODUCING AND GATHERING IT, TO PIPELINES FOR RESALE IN OTHER STATES."

Senator Wheeler who sponsored the bill in the Senate said:

> " 'It does not attempt to regulate the producers of natural gas or the distributors of natural gas; only those who sell it wholesale in interstate commerce.' 81 Cong. Rec. p. 9312." (*Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 US 581, 89 L.Ed. 1206.)

> "In the hearings upon the earlier bill, Mr. DeVane, Solicitor of the Federal Power Commission, stated: 'Par. 1(b) also provides that the Commission shall have no jurisdiction over the gathering or gathering rates for natural gas.' 'Gathering rates,' he explained as 'The rates that are paid in the gathering field.' He further stated, 'There is no control of the gathering rate; the Commission would not have jurisdiction. That price is fixed by competitive conditions that exist in the field.'

He said that the Commission does not have any power over the price 'that is paid to the gatherer, to the man that produces it; that is binding if the transaction is at arm's length. If the transaction is not at arm's length, of course, its reasonableness may be inquired into, under the decisions of the Supreme Court.' There is nothing in the subsequent Legislative history to indicate that this understanding with respect to par. 1(b) in the earlier Act was changed at a later stage, and par. 1(b) as finally adopted indicates no such change. Hearings on HR 11662, 74th Cong. 2d Sess pp. 28, 42, 43." (*Colorado Interstate Gas Co.* v. *Federal Power Commission, supra.*)

Or, as this Court said in the case of *Illinois Natural Gas Company* v. *Central Illinois Public Service Company*, 314 US 498, 86 L. Ed. 371:

"An avowed purpose of the Natural Gas Act of June 21, 1938, was to afford, through the exercise of the national power over interstate commerce, an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate, which this Court had declared to be interstate commerce not subject to certain types of state regulation, H.R. No. 709, Committee on Interstate and Foreign Commerce, 75th Cong. 1st Sess. April 28, 1937. By its enactment Congress undertook to regulate a defined class of natural gas distribution without the necessity, where Congress has not acted, of drawing the precise line between state and federal power by the litigation of particular cases."

The basic purpose of the Natural Gas Bill was to occupy the field in which the Supreme Court had held the states might not act. H. Rep. No. 709, 75th Congress 1st Sess. p. 2. "In accomplishing that purpose the bill was designed to take 'no authority from State commissions' and was 'so drawn as to complement and in no manner usurp State regulatory authority.' Id. p. 2. And the Federal Power Commission was given no authority over the 'production or gathering of natural gas.' Sec. 1(b)." *Federal Power Com.* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610, 88 L.Ed. 333, 349.

"The primary aim of * * * (the Natural Gas Act) was to protect consumers against exploitation at the hands of natural gas companies. Due to the hiatus in regulation which resulted from the Kansas Natural Gas Co. Case and related decisions, state commissions found it difficult or impossible to discover what it cost *interstate pipeline companies* to deliver gas within the consuming states; thus they were thwarted in local regulation." *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 88 L.Ed. 333. (Emphasis added)

The hiatus which Congress intended to close by the Natural Gas Act was that created by "prior constitutional decisions" not what the Supreme Court has "since decided."[3]

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[3]*Federal Power Commission* v. *East Ohio Gas Co.*, 338 US 464, 94 L.Ed. 268.

In those prior constitutional decisions this court held that a state has jurisdiction over a company's local distribution of gas purchased from a company transporting it into the state, *East Ohio Gas Co.* v. *Tax Commission*, 283 U.S. 465, 75 L.Ed. 1171, and over a company which distributes locally to consumers gas which it transports from another state, *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 US 23, 64 L.Ed. 434, even though the consumers be industrial users of gas, *Southern Natural Gas Corp.* v. *Alabama*, 301 US 148, 81 L.Ed. 970; that a state had *no* jurisdiction over "the transportation of gas through pipelines from one state to another" nor the price charged therefor to local distributors, *Public Utilities Commission* v. *Landon*, 249 US 236, 63 L.Ed. 577, where "there is no relation of agency between the supply company and the distributing companies or other relation except that of seller and buyer," *Missouri* v. *Kansas Natural Gas Co.*, 265 US 298, 68 L.Ed. 1207.

These cases were not concerned with an arms-length sale by a producer and gatherer to a pipeline company in which the gatherer and producer had no interest and with which the producer and gatherer was not affiliated or connected.

The Natural Gas Act was designed and passed, as the cases show, to control those companies which transported and sold gas at wholesale in interstate commerce. It was aimed at natural gas companies. It

was *not* aimed at independent producers and gatherers of natural gas who sold their gas to interstate transporters of gas.

That is why the Natural Gas Act exempts "any other transportation or sale of natural gas" excepting transportation in interstate commerce and sale in interstate commerce. That is why the Act does not apply "to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

The Court below states that this Court "has repeatedly upheld the Commission's authority under the Natural Gas Act to regulate the rates at which a producer and gatherer of natural gas sells it, after producing and gathering it, to pipeline companies for resale in other states." There is no decision by the Supreme Court of the United States to sustain this statement.

The Court herein below cites *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 US 581, 89 L.Ed. 1206, but this case does not support the statement. The sales in question in that case were not sales by an independent producer of gas to a natural gas company. The sales in question in that case were sales by Canadian River Gas Company, a natural gas company within the meaning of the Act, to Colorado Interstate Gas Company, *an affiliate*, admittedly a natural gas company, and resales by Colorado Inter-

state Gas Company to distributing companies, and to Colorado-Wyoming Gas Company for resale by it to distributing companies. This case did not involve sales by an independent producer of gas to a natural gas company.

The Court of Appeals next cites *Interstate Natural Gas Company* v. *Federal Power Commission*, 331 US 682, 91 L.Ed. 1742. In that case this Court held that a *natural gas company* which produces, gathers and transports gas in its own pipeline and thereafter sells it to an *affiliated* natural gas company and two other natural gas companies *not at arms length* is subject to the Natural Gas Act. This case was not one involving sales by an independent producer of gas to a natural gas company.

The Court of Appeals next cites *Peoples Natural Gas Company* v. *Federal Power Commission*, 127 Fed. 2nd 153, Cert. Den., 316 US 700, 89 L.Ed. 1769. In that case the same Court herein below there held that where a producer sells gas to an *affiliated* transportation company for *immediate interstate* transportation, sale, and resale for public consumption, it is within the jurisdiction of the Federal Power Commission. This case did not involve sales by an independent producer and gatherer to a transporter in which the producer and gatherer had no interest and with which it was not affiliated or connected.

The Court of Appeals cites no case where the Supreme Court has held that a sale by an independent

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producer and gatherer of gas to a natural gas company in which it has no interest and with which it is not affiliated or connected is subject to regulation by the Federal Power Commission under the Natural Gas Act. We have found no such opinion by the Supreme Court. We think there is none.

II.

THE LONG ADMINISTRATIVE INTERPRETATION OF THE ACT BY THE COMMISSION IS INCONSISTENT WITH THE PROPOSITION THAT THE COMMISSION HAS "AUTHORITY UNDER THE NATURAL GAS ACT TO REGULATE THE RATES AT WHICH A PRODUCER AND GATHERER OF NATURAL GAS SELLS IT, AFTER PRODUCING AND GATHERING IT, TO PIPELINE COMPANIES FOR RESALE IN OTHER STATES."

Numerous reports, orders and decisions of the Federal Power Commission issued since the enactment of the Natural Gas Act, upon which operators and producers throughout the country have relied, are to the effect that:

> "All activities, including sales made at arms' length, by those who only produce, gather or process natural gas prior to its transportation or sale by others for resale in interstate commerce are exempt from the provisions of the Natural Gas Act." Federal Power Commission Release No. 3257 (G-1016), Docket No. G-580, March 7, 1947.

and that:

> "Where a person not otherwise subject to the jurisdiction of the Commission, is engaged in production or gathering of natural gas exclusive of its transportation in interstate commerce and makes arm's-length sales and deliveries of natural gas in interstate commerce as an incident to or upon completion of that person's production or gathering, the provisions of the Natural Gas Act do not apply." F.P.C. Release No. 3348 (G-1076) Docket No. G-352, Opinion No. 149, May 22, 1947.

Independent producers and gatherers of natural gas have applied for and received Rulings from the Commission that they are exempt from the Act.

In the matter of R. J. and D. E. Whelan, Docket No. G-899, May 20, 1947, the Commission issued such a ruling on finding that the partnership proposed to sell gas to Texas Eastern Transmission Corporation by means of a gathering line connected to Texas Eastern's pipeline after it produced, gathered and dehydrated such gas; that the partnership was not in any way affiliated with anyone engaged in production, gathering or transmission operations, and the contemplated sale would be an arm's length transaction; and that the partnership would not be engaged in the transportation of natural gas in interstate commerce in the delivery of gas to Texas Eastern under the proposed contract.

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In the Matter of Columbian Fuel Corporation, 2 F.P.C. 200, decided in June, 1940, sales by an independent producer to a natural gas company were involved. The Commission held, in declining to assume jurisdiction that:

> "* * * it was not the intention of Congress to subject to regulation under the Natural Gas Act all persons whose only sales of natural gas in interstate commerce, as in this case, are made as an incident to and immediately upon completion of such person's production and gathering of said natural gas and who are not otherwise subject to the jurisdiction of this Commission."

The Commission further held at p. 207:

> "The companies to be subjected to regulation were conceived of as 'pipe line' companies, and it was assumed that production and gathering would enter the field of regulation only to the extent that the 'pipe line' companies, either directly or through affiliates, controlled the production or gathering of the gas so transported."

The Federal Power Commission has repeatedly said that the mere fact that an independent producer of gas sells that gas to a natural gas company does not make the independent producer a natural gas company. For more than sixteen years, ever since the act was adopted in 1938, the Commission has construed the Act as not applying to sales by independent producers of natural gas.

"The construction given to a Statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons." *United States* v. *Andrew M. Moore*, 95 US 760, 24 L.Ed. 588.

III.

INDUSTRY-WIDE CHAOS WOULD RESULT FROM THE COMMISSION'S ASSERTTION OF "AUTHORITY UNDER THE NATURAL GAS ACT TO REGULATE THE RATES AT WHICH A PRODUCER AND GATHERER OF NATURAL GAS SELLS IT, AFTER PRODUCING AND GATHERING IT, TO PIPELINE COMPANIES FOR RESALE IN OTHER STATES."

Independent producers, such as amici curiae, constitute a large part of the great American oil industry. These independent producers have been able to meet the oil and gas demands of an ever increasing peacetime economy and all wartime requirements under well administered State oil and gas conservation laws.

They are now faced with a conflict between their operations under regulations of the State Oil and Gas Conservation laws and the decision of the court below that the Commission has authority "under the Natural Gas Act to regulate the rates at which a producer and gatherer of natural gas sells it, after producing and

gathering it, to pipeline companies for resale in other states."

We cite one example. The Railroad Commission of Texas, and perhaps other state conservation agencies, prohibits the flaring of casinghead gas produced with the oil. If producers comply with the Railroad Commission's non-flaring orders by gathering and selling the gas to pipeline companies which resell it in other states, then, under the statement of the Court below herein complained of, such producers would come under the provisions of the Natural Gas Act and be subject to regulation by the Federal Power Commission. They are faced with a conflict between regulation by the State and regulation by the Federal Power Commission.

Several states and their conservation commissions, including Texas, have strongly resisted the attempt of the court below to impress upon the Commission the power "to regulate the rates at which a producer and gatherer of natural gas sells it, after producing and gathering it, to pipeline companies for resale in other states."

The opposition of the state affected is a significant factor to be considered, and "where sales, though technically consummated in interstate commerce, are made during the course of production and gathering and are so closely connected with the local incidents of that process as to render rate regulation by the Federal

Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory functions, the jurisdiction of the Federal Power Commission does not attach." *Interstate Natural Gas Company* v. *Federal Power Commission*, 331 US 682, 91 L.Ed. 1742.

Conclusion

The statement of the Court herein below is not supported by a single decision of the United States Supreme Court; it is contrary to the plain language of the Natural Gas Act and to the Departmental construction placed thereon by the Federal Power Commission; and would deny to the states the right to administer the conservation statutes.

Amici curiae herein merely sell the gas produced and gathered from their wells to a pipeline company in which they have no interest and with which they have no affiliation or connection. They respectfully pray this Court to make clear that the Commission does *not* have authority "under the Natural Gas Act to regulate the rates at which a producer and gatherer of natural gas sells it, after producing and gathering it, to pipeline companies for resale in other states."

Respectfully submitted,

B. J. Essex,
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